

No. 11-2328

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

DTE ENERGY COMPANY and DETROIT EDISON COMPANY,

Defendants-Appellees.

**On Appeal from the U.S. District Court for the Eastern District of Michigan,
No. 10-13101 (Hon. Bernard A. Friedman)**

**BRIEF OF *AMICI CURIAE* AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, AND
UTILITY AIR REGULATORY GROUP IN SUPPORT OF DEFENDANTS-
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations
and Financial Interest**

Sixth Circuit
Case Number: 11-2328 Case Name: United States v. DTE Energy Co., et al.

Name of counsel: William L. Wehrum

Pursuant to 6th Cir. R. 26.1, Utility Air Regulatory Group
Name of Party

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 11-2328

Case Name: United States v. DTE Energy Co., et al.

Name of counsel: Harry M. Ng

Pursuant to 6th Cir. R. 26.1, American Petroleum Institute

Name of Party

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations
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Sixth Circuit

Case Number: 11-2328

Case Name: United States v. DTE Energy Co., et al.

Name of counsel: Richard S. Moskowitz

Pursuant to 6th Cir. R. 26.1, American Fuel & Petrochemical Manufacturers

Name of Party

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s/Richard S. Moskowitz

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

2002 NSR Reform Rules	EPA, Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, Final Rule, 67 Fed. Reg. 80,186 (Dec. 31, 2002)
AFPM	American Fuel & Petrochemical Manufacturers
API	American Petroleum Institute
CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
NSR	New Source Review
PSD	Prevention of Significant Deterioration
RMRR	Routine Maintenance, Repair and Replacement
SIP	State Implementation Plan
TVA	Tennessee Valley Authority
UARG	Utility Air Regulatory Group
WDNR	Wisconsin Department of Natural Resources

INTRODUCTION

The American Fuel & Petrochemical Manufacturers (“AFPM”), American Petroleum Institute (“API”), and Utility Air Regulatory Group (“UARG”) (collectively, “Amici”) have member companies that own and operate complex industrial facilities – including power plants, petroleum refineries, petrochemical manufacturing facilities, and related operations. These facilities consist of thousands of structures, vessels, and various equipment operated in an integrated fashion to produce the desired products. The failure of any of these parts—from the smallest valve to the largest components or structures—could result in unsafe or unreliable operation. As a result, companies routinely maintain, repair, and replace equipment and systems to help ensure reliable and safe operations to produce the fuels, chemicals, and electricity that our Nation’s economy and individuals need for modern life. These facilities also need to have the flexibility to pursue process changes that can further their business and meet the needs of their customers. One of the key issues presented in this case relates to whether these types of activities constitute “major modifications” under the 2002 New Source Review (“NSR”) Reform Rules, 67 Fed. Reg. 80,186 (Dec. 31, 2002). A major modification triggers an expensive and complex permitting process which can take several years to complete before the work can even begin and serves to deter some companies from undertaking these projects. This case thus deals with

an issue of national importance and Amici have a substantial interest in its proper resolution and ensuring that the 2002 NSR Reform Rules are given their intended meaning without having EPA erode through its enforcement policies the improvements accomplished by the rule.

For decades, Amici have participated on behalf of their members in rulemakings and other Clean Air Act (“CAA”) proceedings and in litigation arising from those proceedings. With respect to the 2002 NSR Reform Rules, Amici were heavily involved in the administrative and judicial proceedings that shaped them. They submitted extensive comments to EPA, and participated in the ensuing D.C. Circuit litigation. *See New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). That litigation spanned several years, and involved extensive briefing and participation by Amici. Along with other industry organizations, Amici intervened in *New York* in support of EPA in defense of the provisions of the 2002 NSR Reform Rules at issue in this case. Amici thus have a unique and deep understanding of the rulemaking process, and how the 2002 NSR Reform Rules were developed and originally interpreted by EPA.

Amici’s purpose is to present a history of the enforcement of the NSR program and the extensive rulemaking process that led to the 2002 NSR Reform Rules. This background helps explain why the 2002 NSR Reform Rules were adopted, what improvements they sought to achieve, and why the characterization

of those Rules advanced by the Government in this case was properly rejected by the district court.

Under the interpretation of the rules that the Government asserts in this litigation, projects undertaken in reliance on the 2002 NSR Reform Rules could be alleged to trigger liability, and be embroiled in lengthy and expensive litigation, even though the projects were not projected by the company to cause an emissions increase and, in fact, have not caused an emissions increase. The interpretation advanced here is inconsistent with the history and purpose of the 2002 NSR Reform Rules. It is inconsistent with the plain language of the 2002 NSR Reform Rules. And it is inconsistent with the district court's application of the plain language of those Rules—that a project “is not a major modification if does not cause a significant emissions increase.” 40 C.F.R. § 52.21(a)(2)(iv)(a). If the interpretation of the 2002 NSR Reform Rules advanced by EPA counsel in this litigation is accepted, the certainty and predictability of NSR applicability for routine repair or replacement or process changes that do not result in emissions increases above applicability thresholds would be lost for all of the major industries represented by Amici. This would have a chilling effect on companies conducting these critical projects and would create a significant disincentive for projects that would improve efficiency, productivity, safety, and reliability.

AFPM is a non-profit, national trade association headquartered in the District of Columbia representing nearly 450 members, including virtually all U.S. refiners and petrochemical manufacturers. API is a nationwide, not-for-profit association representing over 470 member companies engaged in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and gas products. UARG is a non-profit, unincorporated trade association of individual electric utilities and national industry trade associations.

Neither Party's counsel authored this brief in whole or in part. No person other than Amici and their members contributed money to the preparation of this brief. Counsel for the Government and Detroit Edison have consented to the filing of this brief.

ARGUMENT

I. Enforcement of the NSR Program in the Electric Utility Industry and the Advent of NSR Reform.

EPA's enforcement office developed a theory in the late 1990s of universal NSR liability for the electric utility industry. During the fall of 1999, EPA's enforcement chief claimed that EPA had assembled a clear case that the utility industry systematically violated NSR for two decades: "Unless we're getting something wrong here," the EPA official recalls saying to utility executives, "these are violations of the law. Y'all want to step up to the plate?" Bruce Barcott,

Changing All the Rules, N.Y. Times Magazine, Apr. 4, 2004, available at <http://www.nytimes.com/2004/04/04/magazine/changing-all-the-rules.html>. By inviting industry to “step up to the plate,” it became clear that the Enforcement Office wanted a “global settlement,” under which industry would agree to accelerate future control technology retrofits required under other CAA programs in exchange for EPA eschewing a massive and expensive enforcement initiative. Otherwise, the Enforcement Office expressed concern that the “SIP process” in place would not “result in reduced emissions until well after the millennium.” EPA, *Enforcement Focus: Coal-Fired Power Plants*, Inside EPA Weekly Report at 9 (Dec. 12, 1997).

As it turns out, EPA’s enforcement office *was* getting “something wrong”—it was advancing a new interpretation of the NSR program contrary to “EPA’s statements in the Federal Register, its statements to the regulated community and Congress, and its conduct for at least two decades” *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 637 (M.D.N.C. 2003), *aff’d on other grounds*, 411 F.3d 439 (4th Cir. 2005), *vacated in Env’tl. Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007). The head of Wisconsin’s environmental agency, for example, wrote EPA that “the changes in PSD/NSR applicability policy are apparently being enforced retroactively by EPA To go back now and enforce a revised policy on sources that relied in good faith on decisions by EPA or WDNR is totally

inappropriate.” Letter from George Meyer, Sec’y, Wisconsin DNR, to Francis Lyons, Administrator, EPA Region V (Oct. 18, 1999).

Likewise, on October 29, 1999, the head of Virginia’s air programs sent a letter to EPA’s enforcement chief criticizing his proposed enforcement initiative as contrary to law and 25 years of EPA practice: “The way [EPA is] now trying to deal with routine maintenance, repair, and replacement is a significant deviation from the way EPA has considered this since the 1970s If EPA wants to change the way they have historically looked at routine maintenance, repair, and replacement, they should do it by rulemaking rather than an enforcement initiative that contradicts EPA’s own policies for the last 25 years.” Letter from John Daniel, Jr., Director, Air Program Coordination, Virginia Dept. of Env’tl. Quality, to Bruce Buckheit, Director, EPA Office of Enforcement and Compliance Assurance (Oct. 29, 1999).

EPA nevertheless commenced an enforcement initiative in November 1999 and filed seven lawsuits against Midwestern and Southern coal-fired utilities, and an administrative action against the Tennessee Valley Authority (“TVA”), the federal government’s own electric utility. Soon thereafter, EPA’s enforcement chief candidly characterized the enforcement initiative as “[p]erhaps . . . reinvented enforcement.” Transcript of American Bar Ass’n Update re Clean Air Act, Part 2 at 40 (May 23, 2000).

The complaint EPA filed against Detroit Edison in the district court is similar to the complaints it filed against utilities in 1999. Those actions were based upon new interpretations of the NSR program developed beginning in the late 1990s. In those actions, the Government devised a method for calculating whether a project would result in a significant net emissions increase, in the spirit of “think[ing] about what’s the best way to make these [emissions] computations at th[at] point in time.” Transcript of Record at 1012, *United States v. Cinergy*, No. 1:99-cv-01693 (S.D. Ind. May 13, 2008); *see also id.* at 1006, 1008, 1009-11. Consistent with its intent to create near-universal liability, this new test invariably resulted in an emissions increase for projects that were historically excluded under NSR.

Before the NSR enforcement initiative was launched in 1999, utilities throughout the country undertook projects to maintain the reliability, efficiency and safety of their generating plants. These projects were undertaken with EPA’s knowledge. But EPA never claimed they triggered permitting requirements under NSR. Before 1999 EPA determined that only *one* project at a utility triggered NSR—a “massive” and “unprecedented” life extension at a Wisconsin Electric Power Company plant that was the subject of the decision in *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 911 (7th Cir. 1990) (“*WEPCO*”).

But five months later, EPA reassured industry and the public “that most utility projects will not be similar to the WEPCO situation, and that ruling is not expected to significantly affect power plant life extension projects.” Letter from William Rosenberg, EPA Ass’t Administrator for Air and Radiation, to John Dingell, U.S. Congressman, at 5-6 (June 19, 1991); *see also United States v. Ala. Power Co.*, 681 F. Supp. 2d 1292, 1309 (N.D. Ala. 2008) (“[T]he court believes the EPA meant what it said when it called the modifications in *WEPCO* extraordinary and that the EPA did not anticipate bringing additional enforcement actions because of *WEPCO*. The fact that years passed before it did so speaks for itself.”). And EPA confirmed that “in most instances” sources could “readily ascertain whether NSR requirements apply . . . ,” and that they need not “seek applicability determinations” 57 Fed. Reg. 32,314, 32,332 (July 21, 1992).

A. EPA Unlawfully Sought to Revise the NSR Program by Way of the Utility Enforcement Initiative.

Because EPA’s positions on the meaning and application of the NSR regulations have been inconsistent, utilities and several states have challenged the NSR enforcement initiative as an unlawful effort to revise the NSR program. In an *amicus* brief filed with the Supreme Court, ten states and the West Virginia Department of Environmental Protection disproved EPA’s “elaborate conspiracy theory” that “state environmental agencies” and “every major utility-industry player (and, more particularly, every major player’s lawyers) either fundamentally

misunderstood or blatantly ignored EPA guidance on the meaning” of the NSR regulations for over twenty years. *Compare* Br. of States as *Amici Curiae* in Support of Respondents, *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007) (No. 05-848), 2006 WL 2689788 at *14 (“States Br.”) *with* Testimony of Bruce Buckheit before the Senate Democratic Policy Comm. at 6 (Feb. 6, 2004), *available at* <http://dpc.senate.gov/hearings/hearing11/buckheit.pdf> (stating that power companies have demonstrated a “cavalier disregard for the law over the past twenty years”).

Rather, the states explained that “EPA’s current litigating position just wasn’t the prevailing understanding of NSR/PSD applicability during the two decades that preceded the current enforcement initiative’s launch in 1999.” States Br. at *14; *see also Ala. Power*, 681 F. Supp. 2d at 1310 (“[EPA] could not tell Congress it envisioned very few *future WEPCO*-type enforcement actions on the one hand, and then argue in subsequent enforcement actions that the utility industry was unreasonable in relying on those, or similar, EPA statements.”).

The utilities have generally prevailed in the NSR enforcement cases. Upon review of the CAA, the NSR rules, and EPA guidance and conduct, many courts have rejected the interpretations of the NSR regulations advanced in the enforcement initiative. *See, e.g., United States v. E. Ky. Power Coop., Inc.*, 498 F. Supp. 2d 976, 993 (E.D. Ky. 2007) (holding EPA deserves no deference where it

“takes an inconsistent view of the regulations, makes inconsistent statements with respect to the regulation, and also enforces the regulation with no discernable consistency”); *Sierra Club v. TVA*, No. 3:02-cv-2279-VEH, slip op. at 9 (N.D. Ala. July 5, 2006) (“I do not see how anyone can say with a straight face that EPA’s 1999 interpretation of [routine maintenance, repair, and replacement] and emissions . . . was the same . . . as [the] published SIP regulations.”); *United States v. Duke Energy Corp.*, No. 1:00CV1262, 2010 WL 3023517, at *7 (M.D.N.C. July 28, 2010) (“EPA is bound by its own interpretation of the PSD regulations, which have consistently referenced industry standards.”); *Pa. Dep’t of Env’tl. Prot. v. Allegheny Energy, Inc.*, No. 05-885, 2008 WL 4960100, at *5, *7 (W.D. Pa. Sept. 2, 2008) (adopting standard of courts that “have not accorded deference to the EPA’s narrow interpretation of [routine maintenance, repair, and replacement] RMRR due to the agency’s conflicting guidance on the issue after *WEPCO*,” but instead comporting with “EPA’s original interpretations of RMRR”).

Courts in more recent enforcement actions have dismissed EPA’s complaints almost from the outset of those cases. See *United States v. Midwest Generation, LLC*, 694 F. Supp. 2d 999, 1008 (N.D. Ill. 2010) (dismissing PSD claims against current owner of facilities); *United States v. Midwest Generation, LLC*, 781 F. Supp. 2d 677, 694 (N.D. Ill. 2011) (dismissing amended complaint alleging NSR violations by both prior and current owner of facilities); *United States v. EME*

Homer City Generation, 823 F. Supp. 2d 274, 297, (W.D. Pa., 2011) (same); Opinion and Order Granting Defendants' Motion for Summary Judgment, *United States v. DTE Energy Co.*, No. 2:10-cv-13101-BAF-RSW (E.D. Mich. Aug. 23, 2011) (the decision below). Citizen suits filed by environmental group plaintiffs reached similar results. See *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1023 (8th Cir. 2010) (affirming dismissal of NSR citizen suit); *Nat'l Parks & Conservation Ass'n v. TVA*, 502 F.3d 1316, 1330 (11th Cir. 2007) (same); *Nat'l Parks Conservation Ass'n, Inc. v. TVA*, No. 3:01-CV-71, 2010 WL 1291335, at *27-34 (E.D. Tenn. Mar. 31, 2010) (following a bench trial, the court entered judgment for TVA, finding the tube component replacement projects in question did not trigger NSR permitting requirements).

In the enforcement cases, EPA took the position that, under the NSR rules in effect at the time the targeted projects were undertaken (*i.e.*, the pre-2002 NSR rules), actual post-project emissions did not matter. Rather, EPA developed its own post hoc "preconstruction" projections purportedly showing that the company should have projected emissions to increase as a result of the projects. That litigation-driven methodology, which invariably predicted emissions increases, was rejected as unreliable in two recent cases. *United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010); *United States v. Ala. Power Co.*, 773 F. Supp. 2d 1250 (N.D. Ala. 2011).

Although the defendant companies prevailed in these cases, it took more than ten years to resolve them (the defendants in *Cinergy* and *Alabama Power* were both first sued in 1999). Thus, the companies endured an extensive period of regulatory uncertainty and invested millions of dollars and countless hours in defending against inflated emissions estimates that ultimately were proven to be incorrect and inadmissible. This is the problem that the 2002 NSR Reform Rules were designed to fix.

B. By 2002, EPA Recognized That NSR Reform Was Necessary.

Given the widespread frustration over the NSR enforcement initiative, EPA decided to change the NSR program. EPA concluded in a 2002 Report to the President that “the NSR program ha[d] impeded or resulted in the cancellation of projects which would maintain and improve reliability, efficiency and safety of existing energy capacity.” EPA, New Source Review: Report to the President, at 1 (June 13, 2002), *available at* www.epa.gov/nsr/documents/nsr_report_to_president.pdf (“NSR Report to President”). Likewise, EPA acknowledged that NSR was “extremely cumbersome,” and that it “actually put up barriers to facilities modernizing and becoming more efficient[.]” EPA’s Oral Argument, Transcript of Proceedings, at 78, *New York v. EPA*, No. 02-1387 (D.C. Cir. Jan. 25, 2005). EPA also recognized that “[a]lthough NSR is only triggered when emissions increase, ... commenters

argued that the way EPA calculates an increase in emissions can actually have the effect of subjecting a project to NSR that would decrease actual emissions.” NSR Report to President at 29.

EPA sought to change the NSR program to “address concerns raised during [its] NSR review as well as many other concerns presented to EPA about NSR over the past decade.” NSR Report to President at 32. The Agency also sought to eliminate “[u]ncertainties inherent in the current major NSR permitting approach,” where it was “difficult for the owner or operator to know with reasonable certainty whether a particular activity would trigger major NSR,” 70 Fed. Reg. 61,081, 61,093 (Oct. 20, 2005); to provide “greater regulatory certainty, administrative flexibility, and permit streamlining . . .” 67 Fed. Reg. at 80, 186; and to remove “barriers and creat[e] incentives for more energy efficient or lower-emitting processes . . . without requiring a full NSR permit process,” EPA’s Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules at 1 (Nov. 21, 2002), *available at* <http://www.epa.gov/nsr/documents/nsr-analysis.pdf>. The result of EPA’s efforts “was NSR Reform, which addressed many of the problems that had become apparent under the prior rules.” Br. of Resp. Lisa Jackson, Administrator of EPA, *NRDC v. Jackson*, No. 09-1405, 2011 WL 2443956, at *2 (7th Cir. Feb. 8, 2011).

C. The 2002 NSR Reform Rules.

The 2002 NSR Reform Rules adopted a straightforward method for determining NSR applicability. In general, for an existing unit, the 2002 rules require a source to make a post-change emissions projection before beginning a project to determine whether that project will cause a significant increase in emissions and thus trigger NSR permitting requirements.¹ 40 C.F.R.

§ 52.21(b)(41)(i)-(ii). If the source projects that the project will cause a significant emissions increase, the source must apply for and obtain a permit from the permitting authority before commencing construction. *See, e.g.*, CAA §§ 165(a), 173(a), 42 U.S.C. §§ 7475(a), 7503(a). If the source projects that the project will not cause a significant emissions increase but determines that there is a reasonable possibility of such an increase, the source must record that projection and report post-change emissions on an annual basis for 5 or 10 years to the applicable

¹ This aspect of the 2002 NSR Reform Rules has always been a part of the NSR program. EPA Technical Support Document for the Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NSR): Reconsideration, EPA-465/R-03-005, at 72 (Oct. 30, 2003), *available at* <http://www.epa.gov/NSR/documents/petitionresponses10-30-03.pdf>, (“EPA’s Response to Petitions for Recons.”) (“The NSR program has always relied upon sources to decide when and whether they need a major NSR permit.”); *see also id.* at 20 (“Regulations always involve an evaluation of how the requirements apply in given circumstances. The fact that an owner or operator makes the determination in the first instance is not an unreasonable approach to implementing the provision.”).

permitting authority. 40 C.F.R. § 52.21(r)(6)(iii). A “reasonable possibility” exists where the projected increase is at least 50% of the amount that is a significant emissions increase under the rules. *Id.* § 51.21(r)(6)(vi). In some cases, before beginning construction, the source must also submit a notice to the permitting authority containing the projection and other information required under 40 C.F.R. § 52.21(r)(6)(i). Once that notification is submitted or records are maintained (as applicable under the rules), construction may proceed. *Id.* § 52.21(r)(6)(ii).

According to EPA, these “new rules allow [sources] to undertake changes at existing emissions units that will not result in significant emissions increase (and significant net emissions increases) as long as when there is a reasonable possibility that the project may result in a significant emissions increase, the source satisfies the requirement for maintaining appropriate operating records and documenting the annual emissions following the change to ensure that the change is not really a major modification.” EPA, Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations (Nov. 2002), *available at* http://www.epa.gov/NSR/documents/nsr-tds_11-22-02.pdf, at II-3-4 (“EPA’s Response to Comments”).

II. During the Rulemaking Process, EPA Considered and Rejected Many of the Government's Arguments in This Appeal.

Key aspects of the Government's arguments to this Court were addressed in EPA's 2002 NSR Reform rulemaking. EPA made it clear in 2002 that the NSR Reform Rule does not work in the way that EPA's counsel now argues that they do in this appeal. In other words, EPA's current interpretation of the NSR Reform Rule is facially and irreconcilably inconsistent with the rule itself.

A. A Source's Pre-Project Projection is Not Dispositive.

EPA asserts that the district court's decision renders the source's preconstruction analysis "dispositive" such that the source could intentionally "*understate* future emissions" and, thus, forever avoid NSR. EPA Br. at 28 (emphasis added). But this clearly is not true. The rules make it abundantly clear that, "[r]egardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(b). As noted above, if there is a reasonable possibility that a project will cause a significant emissions increase, the source must record its emissions projection and report post-project emissions for 5 or, in some cases, 10 years. And, even if there is no reasonable possibility, EPA concluded when it adopted the 2002 NSR Reform Rule that ample information is otherwise available to assure NSR compliance. *See infra* § II.B., p. 18. Thus, post-change actual emissions are the litmus test for a source's pre-change

projections. If a source intentionally or unintentionally understates its emission projections before the project, it will become subject to NSR and possible enforcement when actual post-project emissions show a significant increase caused by the project.

The record of the 2002 NSR Reform rulemaking makes it clear that EPA strove to ensure NSR compliance by carefully balancing the pre- and post-project obligations. For example, the required records “enable the source and the reviewing authority to ensure that the physical or operational changes that were made do not actually trigger a major modification.” EPA’s Response to Comments at I-4-46. They also “promote careful and accurate projections so that sources will not have to face the risk of retroactive NSR applicability and possible enforcement actions.” *Id.* at I-4-18; *see also* EPA’s Response to Petition for Mandamus at 11, *New York v. EPA*, No. 02-1387 (D.C. Cir. Oct. 20, 2006) (rejecting the claim that the recordkeeping and reporting requirements “undermine the NSR program . . . [as] “pure[] . . . speculation that sources will utilize . . . [those] . . . requirements to evade NSR requirements” because there is “no evidence that such evasion is occurring or would be expected to occur”) (quotations omitted).

Likewise, EPA will not be relying on a source’s “own unenforceable estimate of its annual emissions” under the 2002 NSR Reform Rules, as EPA now

contends. EPA Br. at 27 (quoting *WEPCO*, 893 F.2d at 917). Indeed, EPA rejected the very same argument in defending the 2002 NSR Reform Rules:

Nor, under the new NSR rules, will EPA be relying on a source's 'own unenforceable estimates of its annual emissions.' *WEPCO*, 893 F.2d at 917. As noted, in many of the cases, sources will be required to maintain their records for five (or sometimes ten) years. A source must report any exceedences in emissions that bring the unit into the NSR program, and a source must make its records available for inspection at the request of the permitting authority.

EPA's Response to Emergency Mot. for Stay of the New Source Review Rule at 21, *New York v. EPA*, No. 02-1387 (D.C. Cir. Feb. 21, 2003).

B. Sources That Are Not Required to Report Emissions Under the 2002 NSR Reform Rules Do Not Frustrate NSR Enforcement.

The Government next argues that the district court's decision cannot be right, because sources can avoid NSR scrutiny when they are not required to retain and report records. EPA Br. 38-42 (suggesting that a lack of monitoring data would "prevent PSD enforcement"). But EPA explained during the rulemaking why its current litigation position is wrong—EPA "has numerous means of enforcing the NSR provisions against such a source," including "[r]ecords to report emissions. . . and . . . records for business purposes." 72 Fed. Reg. 10,445, 10,450 (Mar. 8, 2007). These records—according to EPA—provide the agency with "an adequate basis to bring to bear certain enforcement tools, such as the authority to compel document production, conduct inspections, and compel testimony, in order

to enforce the ‘reasonable possibility’ standard.” *Id.* EPA also agreed with “commenters who note[d] that there are other mechanisms to collect information to determine whether further investigation into a source’s compliance is warranted.”

EPA’s Response to Petitions for Recons. at 95. As EPA explained:

Many of the projects undertaken at a facility will trigger reviewing authority review under the State’s minor NSR program. Under Title V, sources are required to report emissions information in permit applications [*see* 40 CFR 70.5(c)(3)], in periodic reports (*see* 40 CFR 70.6(a)(3)(iii)), and in many States for purposes of calculating fees. Information related to the monitoring data is required to be retained by the source for 5 years. *See* 40 CFR 70.6(a)(3)(ii)(B). State emission inventory requirements also require sources to report emissions from their facilities. While this information may not directly indicate a given unit’s baseline actual emissions or its projected actual emissions, it will provide reviewing authorities information to determine whether there has been an increase over time.

Id. Likewise, for sources that determine demand growth and other factors unrelated to the change cause post-project emissions to exceed 50 percent of the applicable NSR level (as is the case here for Detroit Edison), pre-change record-keeping is required. EPA made clear that such “pre-change records provide permitting authorities and enforcement officials sufficient information to determine whether the type of project undertaken could have a causal link to increases in emissions. . . and [to] enforce NSR requirements.” Letter from Stephen L. Johnson, EPA, to Anne Milgram, Att’y General, New Jersey, Response to Petition

for Reconsideration (Jan. 14, 2009), *available at*
<http://www.epa.gov/nsr/documents/20090115nj.pdf>.

In any event, EPA cannot now complain about the lack of a more stringent reporting requirement because it expressly rejected such a requirement during the rulemaking process. EPA Br. at 38 (alleging that “it would be absurd for th[e] rules to have imposed such a limited data monitoring requirement”). As EPA explained in defending the 2002 rules, “[b]y eliminating the need for those sources that cannot reasonably be expected to come within the program to maintain or submit necessary files, EPA has done nothing more than ease the administrative burden on both sources and permitting authorities.” EPA’s Response to Emergency Mot. for Stay of the New Source Review Rule at 21, Doc. No. 02-1387 (D.C. Feb. 21, 2003); *see also id.* at 20 (“If there is no reason to believe that a significant increase would occur, there is no benefit to be gained from keeping record of such decision.”); *id.* at 21 (“EPA has merely eased the recordkeeping burden on entities that have no reasonable possibility of coming within the regulations.”); 72 Fed. Reg. 72,607, 72,610 (Dec. 21, 2007) (“[A]gencies do not invariably require the regulated community to keep records to prove the nonapplicability of a requirement. In imposing recordkeeping requirements in this case, we strove for a balance between ease of enforcement and avoidance of

requirements that would be unnecessary or unduly burdensome on reviewing authorities or the regulated community.”).

Instead, EPA decided to limit the “recordkeeping requirements to those projects for which variability in calculating emissions creates an interest in obtaining additional information in order to confirm that the appropriate applicability outcome is reached.” *Id.* Contrary to the Government’s current litigation position, the appropriate applicability outcome is reached under the 2002 NSR Reform Rules based on actual emissions data, not on what EPA’s *post hoc* preconstruction projection might show. 40 C.F.R. § 52.21(a)(2)(iv)(b) (“Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.”).

C. EPA Knew That Sources Would Manage Emissions to Avoid Significant Increases Under the 2002 NSR Reform Rules.

EPA next argues that Detroit Edison should not be permitted to manage emissions to avoid significant increases from its units. But this is exactly what EPA anticipated sources would do under the 2002 NSR Reform Rules.

As part of its rulemaking process, EPA conducted an analysis of the environmental impact of the 2002 NSR Reform Rules. In a November 2002 supplemental analysis, EPA rebuffed charges that the adoption of the 2002 NSR Reform Rules and the “actual-to-projected actual” emissions test would allow

projects with actual emissions increases to escape NSR review. In doing so, EPA specifically contemplated that sources would manage their units to stay within their emissions projections to ensure compliance with NSR: “[w]hile the actual-to-projected actual test would reduce the number of sources who would need to take permit limits, we find that the environmental benefit of these permit limits is effectively preserved because any source projecting no significant actual increase must stay within that projection or face NSR.” EPA’s Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules at G-5. This same view was expressed by EPA in 2008 in connection with its approval of the 2002 NSR Reform Rules into Wisconsin’s SIP: “EPA has found that while the actual-to-projected actual test would reduce the number of sources that would need to take permit limits, the environmental benefit of these permit limits is preserved, because any source projecting no significant net emissions increase must stay within that projection or comply with NSR.” 73 Fed. Reg. 76,560, 76,562 (Dec. 17, 2008).

In short, that Detroit Edison manages its units to stay below baseline levels is not impermissible under the 2002 Rules, as EPA’s brief contends. It is a compliance measure that EPA knew Detroit Edison and other sources would take, or otherwise risk the possibility of “fac[ing] NSR.”

III. UARG and Amici Did Not Endorse the Government's Current Litigation Position.

In addition to asserting regulatory interpretations that clearly are at odds with its own 2002 Rule, EPA counsel incorrectly claims that UARG endorsed the Government's current interpretation of the 2002 NSR Reform Rules in a brief it filed (in conjunction with AFPM, API, and a host of other industrial interests) in 2004. Brief of Industry Intervenors, *New York v. EPA*, No. 02-1387, 2004 WL 5846442 (D.C. Cir. Oct. 26, 2004). Among others, an issue litigated in *New York* was whether it was reasonable for EPA to require recordkeeping and post-project monitoring only when there was a "reasonable possibility" of an emissions increase, without including a definition of "reasonable possibility" in the rules. Petitioners argued this made the rules "unenforceable." 413 F.3d at 34. EPA and industry intervenors, including UARG, disagreed and defended the rules on the ground that there is always enough information available for EPA to properly enforce the rule.

The meaning of industry intervenors' 2004 arguments becomes clear when the words and phrases that EPA selectively culled from their brief are put back into their broader arguments:

The basic approach to enforcing NSR requirements under the final rules is similar to the approach that existed previously. In either case, a source is to make an initial determination regarding whether a proposed change would result in a significant net emissions increase that,

in turn, would require that the source apply for an NSR permit. If the source's determination ultimately turns out to be incorrect, in the view of EPA or a state agency, the source may be subject to enforcement for violating NSR The final rules do not change the extensive enforcement tools and opportunities available to EPA and states. As this Court stated in *Alabama Power*, "[i]f industries falsely claim to be below the thresholds ..., there exist means to uncover and penalize such abuses." 636 F.2d at 403.

Brief of Industry Intervenors at *18, *19. This argument hardly constitutes agreement by UARG and the other industry intervenors with the current litigation-driven interpretation of the 2002 NSR Reform Rules. In fact, industry intervenors' arguments then are wholly consistent with Detroit Edison's arguments now.

Specifically, industry intervenors argued in 2004 that a source must make the initial determination as to whether a project will result in a significant net emissions increase and that the source may be subject to enforcement if that determination "ultimately turns out to be incorrect" – *i.e.*, is shown through post-project monitoring to have an actual emissions increase caused by the project. Similarly, industry intervenors argued that EPA has extensive enforcement tools and opportunities to "uncover and penalize" companies that "falsely claim to be below the [NSR applicability] thresholds." This argument in no way signals agreement with the notion that a project that is shown through post-project monitoring not to have caused an emissions increase might nevertheless have somehow triggered the need for an NSR permit.

In short, UARG, AFPM, API and the other industry intervenors supported the 2002 NSR Reform Rules because they believed that these rules “were intended to achieve greater regulatory certainty, while facilitating plant improvements consistent with meeting Congress’ emission control objectives.” *Id.* at 19. UARG, AFPM, and API did not then, and do not now, support the interpretation of the 2002 NSR Reform Rules advanced by EPA counsel in its brief before this Court.

CONCLUSION

When it issued the 2002 NSR Reform Rules, EPA asserted that the rules were “intended to provide greater regulatory certainty, administrative flexibility, and permit streamlining, while ensuring the current level of environmental protection and benefit derived from the program.” 67 Fed. Reg. at 80,186. The interpretation of the 2002 NSR Reform Rules asserted by the Government in the instant case is at odds with the plain meaning of the rules and EPA’s clearly stated intent. If this interpretation is allowed to stand, the industries represented by *Amici* – petroleum refining, petrochemicals manufacturing, and electricity generation – would be deprived of the administrative flexibility and regulatory certainty needed to compete in today’s global economy. In short, the interpretation asserted by EPA counsel would perpetuate the very problems that these rules were designed to eliminate.

For these reasons, the district court’s decision should be affirmed.

Respectfully submitted,

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Dated: May 8, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rule 32, I hereby certify that the foregoing Brief of *Amici Curiae* American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and Utility Air Regulatory Group in Support of Defendants-Appellees contains 5777 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court. The brief complies with the typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure as it was prepared using the Microsoft Word 2003 word processing program in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25, I hereby certify that on this 8th day of May, 2012, I served a copy of the foregoing Brief of *Amici Curiae* American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and Utility Air Regulatory Group in Support of Defendants-Appellees electronically through the Court's CM/ECF system upon all counsel of record registered in CM/ECF.

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